Supreme Court of the United States

OCTOBER TERM, 1942.

Docket No. 659.

NATIONAL HANOVER BANK AND TRUST COMPANY, a banking corporation of the State of New York, GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors, etc. and GEORGE CHEW ATKINS and JOHN NORTON ATKINS, individually,

Appellants,

against

WILLIAM D. KELLY, State Tax Commissioner of New Jersey,

Appellee.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

APPELLANTS' REPLY BRIEF.

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The appellee's brief presents some new arguments not advanced heretofore, and is also inconsistent with portions of the opinions of the courts below. Moreover, from time to time it mis-construes or mis-states the argument of the appellants. These matters call for a few observations in reply.

I.

Appellee's Mis-statements of Appellants' Arguments.

In several places in the appellee's brief mis-conception of appellants' arguments has resulted in impor-

tant mis-statements. Considerable space is devoted to knocking down straw men and refuting contentions which have never been advanced.

It is said in appellee's brief (p. 9) that:

> "Appellants say that power to tax, because the estates of the donees were of a contingent nature, must be determined as of the date of death of the donor, when the estates of the sons vested indefeasibly. Appellee says that power to tax must be determined as of the date of transfer, and that here the transfer took place as of the date of the execution of the trust agreement."

This is not an accurate representation of the argument in appellants' brief. Appellants have not said that the power to tax must be determined as of the date of the donor's death; they have said that as of such date the power did not exist, because no transfer then took place. Nor have appellants argued that power to tax should be determined as of any date other than the date of transfer; the question they have raised concerns the date of the transfer New Jersey has assumed to tax. The appellee's brief continues by declaring that the New Jersey courts have unanimously held that the taxable transfer took place when the deed of trust was executed. Appellants' brief pointed out that the opinions of the New Jersey courts were not entirely consistent in this matter, and showed considerable uncertainty. (Appellants' Brief, pp. 29-30).

The appellee's brief repeats this misrepresentation of appellants' argument on page 22, where reference is made to the appellants' "principal contention that the power to tax in the case of an *inter vivos* transfer

of future interests of a contingent character must be determined as of the date of death of the donor", and the same assertion is carried into the point heading set forth on the same page. On the contrary, the argument in Point II of appellants' brief is that there is no power to tax a transfer made at the time of the execution of the trust deed, because no transfer was then made *to the appellants;* and in appellants' Point III it is argued that there is no power to tax at the date of the donor's death because there was no transfer *at that time* from the donor's ownership or control. The appellants have never undertaken to fix the time as of which the power to tax must be determined, because they have consistently maintained that under the circumstances of this case there was no power to tax the transfers to the appellants *at any time.*

With respect to the case of *Pearson* v. *McGraw*, 308 U. S. 313, appellee's brief (p. 32) asserts that appellants have indicated that an appraisal and levy were made in that case as of the date of transfer. What appellants' brief actually suggested was (p. 34) merely that the gifts were taxable according to the nature of the interests as they then existed. We agree with appellee that there would be no basis for a statement that the interests had then been actually appraised, because the result of the decision of this Court was to require a valuation which had been theretofore omitted. Appellee's mis-statement, however, is not of any great importance in itself, except as it reveals the weakness of appellee's criticism of our differentiation of *Pearson* v. *McGraw*. It is of course true, as held in *Keeney* v. *New York*, 222 U. S. 525, that postponement of assessment and collection

in the case of a transfer taxable when made is not in itself unconstitutional; but the time of the appraisal and assessment may nevertheless be some indication to show what particular transfer was intended to be taxed.

Another straw man is set up on page 36 of appellee's brief, where it is said:

> "Want of power to tax, appellants argue, is grounded on the fact that the donor in making the transfer, exercised no privilege and received no protection or benefit conferred by the laws of New Jersey, therefore there is no basis for the imposition of a tax (Brief, pp. 17, 18)."

Appellants have never argued that there could be no taxation by New Jersey unless in making the transfer the donor exercised a privilege or received a protection or benefit conferred by its laws. The appellants' brief did indeed point out that no such privilege was exercised and no such protection or benefit conferred in the present case, and therefore no jurisdiction could be based on any such claim. Appellants fully conceded however, that there may be other constitutional bases of tax jurisdiction including, where the facts warrant, that of domicile. Appellants' main argument in fact recognized that the state rests its present claim of taxation chiefly on the decedent's domicile, and was directed to the principles and authorities showing that in this instance the owner's domicile is an insufficient basis.

II.

Appellee concurs with appellants that there was no taxable transfer at decedent's death.

The appellee's brief, as above stated, attributes to the appellants the contention that the power to tax must be determined as of the date of death. This we have shown to be a mis-statement, because appellants have only argued that under no view whatever could power to tax transfers to these appellants exist at that particular time. The appellee has in no manner disputed this argument and has made no attempt whatever to justify a tax as based on a transfer at the decedent's death.

The appellee on the other hand commits himself unreservedly to the proposition that the taxable transfer—the transfer which the State of New Jersey assumed to tax—took place as of the date of the trust agreement. Not only does the brief declare (p. 9) that the New Jersey Courts have so held and that their determination is conclusive; but the proposition is again put forth as follows (p. 21):

> "Since Atkins reserved neither power to appoint, revoke or otherwise control the final disposition of the trust estate, the transfer of the assets in the trust property took place as of the date of the trust agreement."

The appellee thus wholly abandons the alternative theory suggested in the opinion of the Vice Ordinary and treated in Point III of appellants' brief, that there was some kind of a transfer executed or completed when the decedent died. By abandoning this contention appellee appears to have conceded that the

tax now under consideration cannot be supported by the decisions in *Curry* v. *McCanless*, *Graves* v. *Elliott*, *Whitney* v. *State Tax Commission*, and *Graves* v. *Schmidlapp*, in all of which the jurisdiction to tax was based upon the fact that there was a transfer from the decedent's ownership or control at the time of his death. It is true that appellee also uses the *Curry* case to sustain the argument that the deed of trust itself constituted a taxable transfer to these appellants because of the grantor's domicile at the time of the execution of the deed; but we do not read that case as establishing any such broad proposition, regardless of the nature of the interests transferred and the location of the property and of the transferees. Had that view been adopted it would have been entirely unnecessary for this Court to lay stress upon the power of appointment which had been retained by the grantor and remained subject to her will until the time of her death. In fact no point whatever is made in the opinion of the grantor's residence in Tennessee at the time of the execution of the trust deed. Tennessee's jurisdiction to tax was upheld on the ground of the decedent's residence there at the time of her death, and of her reserved control over the property at that time.

III.

Appellee's Illogical Inferences.

Appellee's brief (p. 24) argued that the transfer effected by the deed of trust must have been a transfer to the appellants, in spite of the fact that they would receive nothing until the future and might never receive anything at all, for the reason that if it were

a transfer to the trustee the future devolution of title would depend upon "the independent and voluntary act of the trustee". This suggestion is contrary to the fundamental principles of trust law and ignores the power of courts of equity to enforce fiduciary obligations and, as a short cut, to consider as done that which ought to have been done. Further, the appellee argues that if the trust deed were a transfer only to the trustee, no tax could be levied even if the trustee were a New Jersey bank or an individual residing in that State, because the New Jersey law "does not attempt to impose" an inheritance tax on transfers from trustees to beneficiaries. This is surprising reasoning, because we would presume from the interpretation given the New Jersey statute in the present case the New Jersey courts would hold the existing statute applicable in the instance cited, and concededly in that event it would not be open to the same constitutional objection. Even if the present statute were not applicable, however, there would be no constitutional objection to its amendment.

The same fallacy attaches to the appellee's argument (p. 25) with respect to joint bank accounts and life insurance proceeds, the taxability of the latter being the subject of *Chase National Bank* v. *United States*, 278 U. S. 327, and *United States Trust Company* v. *Helvering*, 307 U. S. 57. These cases undoubtedly held that a transfer through the medium of a third party will ordinarily be subject to an estate tax, as well as a transfer directly from the decedent to the beneficiary, but they do not present any question of extraterritorial jurisdiction.

Appellee's brief (p. 28) quotes from *Carter* v. *Bagbi*, 92 N. J. L. 390. It is unquestionably true

that the transfer to the trustee was not under the New Jersey statute a taxable event, as the Court of Errors and Appeals there held. That court further held that with respect to contingent remaindermen the transfer did not take place at the time of the execution of the trust deed. It is difficult to say whether the authority of that case has been weakened by the decision now appealed from, but the Vice Ordinary's opinion pointed out that he considered much of it to be regarded as dictum and not controlling. (R., pp. 49-50.) The important point is appellee's concession, by this citation, that the tax cannot be sustained as a tax on the transfer to the trustee.

Again, the appellee's brief is illogical in its treatment of *Binney* v. *Long*, 299 U. S. 280, and *Coolidge* v. *Long*, 282 U. S. 582, and in its attempt to avoid the holding in the former that where remainders are contingent their transfer is taxable by a statute enacted subsequent to the deed of trust. The appellee's brief says (p. 23):

"The controlling principle of these cases is in determining power to tax we must look to the date of the deed begetting the transfer. If the power to tax then exists it is within the power of the state to say when and how that power shall be exercised."

Rather, it seems to us, the controlling consideration in these cases was the nature of the future interest in question, whether vested or contingent. In both cases the statute was subsequent to the trust deed, but was held unconstitutional only with respect to remainders theretofore vested. Later, disregarding *Binney* v. *Long*, appellee's brief uses (p. 29) quotations from *Coolidge* v. *Long* to support the argument that the

taxable transfer in the present case took place at the time of the creation of the Atkins trust deed, even though the remainders were held by the New Jersey courts to be contingent, just as those in the *Bigney* case had been held to be contingent.

It is true, as appellee's brief points out (p. 31), the language of the trust deed in the *Coolidge* case was very similar to that in the Atkins trust deed, and an interesting question is raised as to the effect to be given by this Court to the determination of state courts as to the character of particular estates. This Court proclaimed in the *Coolidge* case that such questions are to be determined by this Court for itself; but it is appropriate to point out that appellee nowhere contends that the New Jersey courts were wrong in holding the Atkins future interests to be contingent, as they undoubtedly were in effect even though similar interests have sometimes been described as "vested subject to being divested". The conclusion in *Coolidge* v. *Long*, holding similar remainders sufficiently vested to be safe against retroactive taxation, was dissented from by a strong minority.

IV.

Technical Considerations and Niceties.

Appellee concurs in our suggestion (Appellants' Brief, p. 26) that the decisions in tax cases, no less than others, should be governed by considerations of substance rather than by technical considerations and distinctions which originated in a feudal economy. *Klein* v. *U. S.*, 283 U. S. 231; *Helvering* v. *Hallock*, 309 U. S. 106; *Helvering* v. *Clifford*, 309 U. S. 331.

The boundaries of constitutional jurisdiction for the purpose of taxation are matters of substantial importance and must be determined with an eye to factors other than the collection of revenue. Other policies of government are to be considered, as well as the rights of the individuals concerned, and all are to be kept in balance.

The rights of nonresidents of New Jersey to come into possession of property never within that State, without being taxed by New Jersey on the ground that a domiciliary of that State once owned it, should depend on indisputable realities rather than on fictions. The sole ground of taxation asserted here is based on the maxim *mobilia sequuntur personam*. Whatever meaning this maxim has is derived from a fiction which, "being a fiction is not allowed to obscure the facts, when the facts become important".

> Holmes, *J.*, in *Blackstone* v. *Miller*, 188 U. S. 189, p. 204.

(The case cited, overruled in *Farmers Loan and Trust Company* v. *Minnesota*, 280 U. S. 204, would seem to have been revived in *State Tax Commission* v. *Aldrich*, 316 U. S. 174.)

Whatever name be applied to the relationship of these appellants to the property before the decedent's death, there is no doubt that their hopes and expectations did not turn into reality until long after all ties with the State of New Jersey had been severed. To recreate the former tie by the device of labeling the grantor's deed of 1929 a then present transfer of a future contingent interest, is to fall back on niceties of conveyancing which have been deemed abandoned. Even that device will not cover the case where

no prospective remaindermen are in existence at the time of the execution of the trust deed. Appellee has not attempted to comment on the hypothetical case set forth at the top of page 33 of the appellants' brief.

No concern need be felt that a reversal of the judgment appealed from will open any tax loopholes. If New Jersey wishes to impose an estate or transfer tax on all the transfers under a deed of trust, including transfers of property outside of the state to a foreign trustee for the benefit of contingent remaindermen, it may readily do so either by amending its statute or altering its interpretation of the present statute. A tax on the immediate transfer to the trustee of the entire title would presumably be constitutional, at any rate would not raise the questions here present. Both the New Jersey courts and the appellee however, say that that transfer is not the one intended to be taxed by the statute now in force.

V.

Non-taxability in New York.

One further point in appellee's brief requires notice but not extended argument. It is there pointed out (p. 37) that if the transfer is not taxed by New Jersey, it may not be taxed at all, because of the policy of the State of New York now embodied in the constitution of that State and the absence of any appropriate statute.

Acceptance of the principle of double taxation has meant that taxability by one state is to be determined independently of the question of taxability by an-

other. It is obvious that New York's failure to exe
cise its rights in that regard, for whatever reaso
will not enlarge the jurisdiction of New Jersey.

Respectfully submitted,

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